SINGAPORE REPORTS

Rimmon Watch Pte Ltd v Great Pacific Finance Ltd

COURT OF APPEAL (SINGAPORE) – CIVIL APPEAL NO 23 OF 1988
WEE CHONG JIN CJ, SINNATHURAY AND THEAN JJ
20 JANUARY 1989

Land Law – Consent of mortgagee to mortgagor entering into three-year tenancy with appellants – Tenancy agreement contained option of renewal for further term of five years – Mortgagee not aware of this option – Whether option binding on mortgagee

Land Law – Mortgage registered under Land Titles Act – Consent of mortgagee to mortgagor entering into three-year tenancy with appellants – Tenancy agreement contained option of renewal for further term of five years – Mortgagee not aware of this option – Whether mortgagee become holder of reversion upon termination of appellants' tenancy and subject to burden of covenant to renew which runs with reversion – No transfer of legal estate to mortgagee as in common law mortgage – Statutory power of entering into possession is of wholly different character from common law mortgagee's right – Land Titles Act (Cap 157, 1985 Ed), s 69

The respondents were mortgagees of certain mortgaged properties. The mortgaged properties were registered land under the Land Titles Act (Cap 157, 1985 Ed) and the mortgage was duly registered in the Land Titles Registry. Clause 5(i) of the mortgage provided that 'the mortgagor will not ... lease ... the mortgaged property ... without the prior written consent of the mortagee'. The appellants were the tenants of the mortgaged properties under a tenancy agreement whereby the mortgaged premises were let by the mortgagors to the appellants for a term of three years. The tenancy agreement contained a term which purported to give the appellants an option of renewal for a further term of five years. The appellants exercised the option of renewal and the respondents commenced proceedings in the High Court against the mortgagors and the appellants seeking, inter alia, the declarations that the purported option was not binding on them (the respondents) and that the respondents were entitled to exercise their rights to obtain possession of the mortgaged properties upon the expiry of the three-year tenancy. The High Court found in favour of the respondents and the appellants appealed to the Court of Appeal.

Counsel for the appellants contended that the grant of the tenancy, including the option to renew, was consistent with the consent given and argued that when the respondents consented to the grant they did not ask to see a copy of it and must, therefore, be taken to have accepted all the covenants and conditions contained in it. The second contention of the appellants was that when the respondents took possession as mortgagees, they thereupon immediately expectant upon the termination became the holders of the reversion of the appellants' tenancy and subject to the burden of the covenant to renew, which ran with the reversion.

Held, dismissing the appeal:

(1) The fact that when the respondents consented to the grant they did not ask to see a copy of it does not necessarily give rise to the inference that they impliedly consented to the whole of the terms of the tenancy.

(2) The question for determination is not whether the covenant to renew invalidated the lease but whether the option to renew was within the terms of the initial consent – the leasing power contained in cl 5(i) of the mortgage being expressed to be subject to the mortgagees' consent, the power to lease, in order to be binding on the mortgagees, must necessarily be derived from the terms of the consent.

(3) The terms of the correspondence between the parties show that the consent given by the respondents was for the grant of a tenancy to the appellants for a term of three years. The consent granted by the respondents was not a blanket consent and could not be construed as such.

(4) There was no evidence that the respondents had expressly accepted the option for renewal for a term of five years. Though they had received a copy of the tenancy agreement, they were not aware of the option until later, when they were contemplating a sale of the property. It cannot be said that, by necessary implication, the respondents had accepted the option.

(5) The appellants' second contention overlooks the fact that although the expression used in s 63(3) of the Land Titles Act is 'mortgage' and that by s 64(1) of the Land Titles Act, Part IV of the Conveyancing and Law of Property Act which deals with 'Mortgages' is to apply to registered mortgages, there is no transfer of the legal estate to the mortgagee as in the case of a mortgage at common law. Thus, unlike the position under common law where the entitlement to take possession goes with the legal estate as of right, the entitlement of the mortgagee under the Land Titles Act to take possession is statutory and is expressly given in s 69. In exercising his statutory power of entering into possession, a mortgagee under the Land Titles Act remains aloof from the legal estate. His right derives its force entirely from s 69 and is of a wholly different character from the legal mortgagee's right under common law title.

Case referred to
1 *King* v *Bird* [1909] 1 KB 837 (distd)

Legislation referred to
Land Titles Act (Cap 157, 1985 Ed) ss 63(3), 64(1), 69, 70(1)
New South Wales Real Property Act 1900 [Aust] s 60

Appeal from: Originating Summons No 1256 of 1987 (High Court, Singapore)

Derek Wood QC (*Liu Yuen Ming* with him) for the appellant.

Scott Thillagaratnam for the respondent.

Cur Adv Vult

Wee Chong Jin CJ (delivering the judgment of the court): The respondents, Great Pacific Finance Ltd, are the mortgagees of #01-86, 87 and 88 Lucky Plaza Shopping Centre, Orchard Road, Singapore, 'the mortgaged properties' of which Rimmon Watch Pte Ltd (then known as Eastern Watch Co Pte Ltd) are the proprietors. The mortgaged properties are registered land under the Land Titles Act (Cap 157, 1985 Ed). The instrument of mortgage dated 27 December 1984 was duly registered in the Land Titles Registry, cl 5(i) of which provides:

> The mortgagor will not sell, transfer, lease, agree to lease, let, license or part with possession of the mortgaged property or any part thereof or accept a surrender of any lease or tenancy without the prior written consent of the mortgagee which may be refused without any reason being assigned therefor

or given either absolutely or on such terms and conditions as the mortgagee may deem fit and the decision of the mortgagee shall be final and conclusive for all purposes.

The appellants, Rimmon Trading Pte Ltd, are the tenants of the mortgaged properties under a tenancy agreement dated 22 January 1985 whereby the mortgaged premises were let by the mortgagors (then known as Eastern Watch Co Pte Ltd) to the appellants for a term of 36 months from 23 March 1985. The tenancy agreement contained a term, cl 4(v), which purports to give the appellants an option of renewal for a further term of five years subject to the same terms and conditions of the tenancy agreement. The appellants have on 22 December 1987 exercised the option of renewal in accordance with the provisions of cl 4(v).

The respondents commenced proceedings in Originating Summons 1256 of 1987 against the mortgagors and the appellants seeking, inter alia, the following declarations:

(1) a declaration that the purported option contained in cl 4(v) of the tenancy agreement dated 22 January 1985 and made between Eastern Watch Co Pte Ltd (In Liquidation) and the defendants is not binding on the plaintiffs as mortgagees of #01-86, 87 and 88 Lucky Plaza Shopping Centre, Orchard Road, Singapore (the mortgaged properties);
(2) a declaration that the plaintiffs are entitled to exercise their rights as mortgagees, including the right to obtain possession of the mortgaged properties upon the expiry of the said tenancy agreement on 22 March 1988.

The application was heard before AP Rajah J who found in favour of the respondents and the appellants now appeal against the judgment of the learned judge.

Counsel for the appellants advanced two main propositions in support of their contention that the judge was wrong in granting the declaration that the purported option contained in cl 4(v) of the tenancy agreement was not binding on the respondents, as mortgagees.

The first proposition is that the grant of the tenancy including the option to renew, was consistent with the consent given. It was argued that when the respondents consented to the grant they did not ask to see a copy of it and must, therefore, be taken to have accepted all the covenants and conditions contained within it. In our view, however, this fact, without more, does not necessarily give rise to the inference that they impliedly consented to the whole of the terms of the tenancy. *King* v *Bird*,[1] cited by the appellants, is not a direct authority for the proposition advanced by the appellants. In *King* v *Bird*,[1] no question arose as to the consent of the mortgagee. The issue was whether the lease by the mortgagor, which contained an option to renew, was a proper exercise of his power as mortgagor to lease. The power to grant a lease (for 21 years) was statutory and was not restricted in any way by the requirement of consent by the mortgagee. In holding that the option to renew did not invalidate the lease, Bucknill J said (at p 845):

> ... I think this proviso *does not invalidate* the lease, because it does not affect the original term of seven years.

It is to be observed that the decision in that case was concerned entirely with the question whether the lease was void for containing an option to renew.

That however, is not the question in the present case. The question for determination is *not* whether the covenant to renew invalidated the lease (it is common ground that the three-year grant was valid), but whether the option to renew was within the terms of the initial consent – the leasing power contained in cl 5(i) being expressed to be subject to the mortgagees' consent, the power to lease, in order to be binding on the mortgagees, must necessarily be derived from the terms of the consent.

To determine this question, it is necessary to consider what constituted the authorized tenancy within the terms of the consent. For this purpose, the correspondence between the parties are important and these are as follows.

On 23 January 1985, the mortgagors wrote to the respondents as follows:

> This is to inform that we are renting the above premises to Rimmon Trading Pte Ltd with effect from 22 January 1985 for a period of three years.
>
> It would be appreciated if you could let us have your consent.

The request for the consent was replied to by the respondents on 25 January 1985 in the following terms:

> We have no objection to your letting out the above premises to Rimmon Trading Pte Ltd for three years on condition that the monthly rentals be paid direct to us. Please let us have a copy of the lease agreement for our record.

On 29 January 1985, the mortgagors wrote to the appellants:

> We enclose a xeroxed copy of letter of 25 January 1985 from the Great Pacific Finance Ltd, our mortgagee, giving consent to us to let out the above premises to you for three years.

On 30 January 1985, the mortgagors replied to the respondents' letter of 25 January 1985 as follows:

> Thank you for your letter Ref 050/85/FBT/pc dated 25 January 1985 on the above matter and its contents have been noted.
>
> A copy of the lease agreement will be forwarded to you in due course.

It was common ground that the respondents did not receive a copy of the tenancy agreement until 5 December 1985.

In our opinion, the terms of the correspondence show that the consent given by the respondents on 25 January 1985 was for the grant of a tenancy to the appellants for a term of three years. The consent granted by the respondents was a not a blanket consent and could not be construed as such. In our view, the terms of the correspondence do not justify an inference that the tenancy, which the mortgagor was authorized by the respondents to create, was a tenancy for a term of 36 months which contained no further term conferring on the appellants an option to renew and the respondents were not under any legal obligation to inquire what the other conditions and covenants were.

The next question is whether upon exercising of their rights under s 69 of the Land Titles Act and accepting the rents from the appellants for the period as from April 1985 the respondents had agreed to the option for renewal. It was not in dispute that the respondents received a copy of the tenancy agreement in December 1985, but there was no evidence that the respondents had expressly accepted the option for renewal for a term of five years. The respondents said that though they had received a copy of the tenancy agreement they were not aware of the option until the second half of 1987 when they were contemplating a sale of the property. On the material before us, it cannot be said that, by necessary implication, the respondents had accepted the option. Such an implication would be inconsistent with their consent for the grant of the tenancy for a term of three years; their consent was not for a tenancy for a term of three years capable of being extended by way of an option to a further term of five years.

The second proposition advanced by the appellants is that the respondents, by their acceptance of rent from the appellants under the agreement, with knowledge of its terms, adopted or otherwise became bound by those terms, including the option to renew. It was argued that when the respondents took possession as mortgagees, they thereupon become the holders of the reversion immediately expectant upon the termination of the appellants' tenancy and subject to the burden of the covenant to renew, which runs with the reversion.

In our opinion this argument is fallacious. It is based on the premise that a mortgage under the Land Titles Act (which, by s 63(3), operates only as a security for payment of a debt) is placed on the same footing as a legal mortgage of land held under common law title and that when the mortgagee takes possession, he inherits the reversionary estate. This argument overlooks the fact that although the expression used in s 63(3) of the Land Titles Act is 'mortgage' and that by s 64(1) of the Land Titles Act, Part IV of the Conveyancing and Law of Property Act which deals with 'Mortgages' is to apply to registered mortgages, there is no transfer of the legal estate to the mortgagee as in the case of a mortgage at common law. Thus, unlike the position under common law, where the entitlement to take possession goes with the legal estate as of right, the entitlement of the mortgagee under the Land Titles Act to take possession is statutory and is expressly given in s 69. Section 69(1) provides as follows:

> 69(1) If default is made in payment of the interest, principal or other money, secured by a mortgage or charge, or in payment of any part thereof, the mortgagee or chargee shall, as against the mortgagor or chargor and those claiming through or under him, be entitled to enter into possession of the mortgaged or charged land and to receive the rents and profits thereof.

In exercising his statutory power of entering into possession, a mortgagee under the Land Titles Act remains aloof from the legal estate. His right derives its force entirely from s 69 and is of a wholly different character from the legal mortgagee's right under common law title. The section makes no attempt to equate the position enjoyed by a mortgagee of Torrens title land with that of a mortgagee of land under common law title. This contrasts, significantly, with s 60 of the New South Wales Real Property Act 1900, which effects a notional conveyance of the legal estate for the limited purpose of entry into possession. Section 60 of the New South Wales Act provides as follows:

> 60 The mortgagee or encumbrancee upon default in payment of the principal sum or any part thereof, or of any interest, annuity, or rent-charge secured by any mortgage or encumbrance may –
>
> (a) enter into possession of the mortgaged or encumbered land by receiving the rents and profits therefor; or
>
> in the *same manner in which he might have made such entry or brought such proceedings or action if the principal sum or annuity were secured to him by a conveyance of the legal estate in the land so mortgaged or encumbered.* (Emphasis added)
>
> (See Baalman, *The Torrens System in New South Wales*, 2nd Ed, p 285.)

Some indirect support for this view may also be found in s 70 of Land Titles Act (which provides for the right of foreclosure of mortgages). Under s 70(1) 'a mortgagor of registered land who is in default shall be deemed to have an equity of redemption, and a mortgagee of registered land shall have the same right to apply ... for an order of foreclosure as if the land were not under the provisions of this Act and the mortgagee held a legal estate therein.' Thus, where the Land Titles Act seeks to incorporate any common law concept applicable to a legal mortgage of land held under common law title, it does so by express provisions.

In our judgment, the conclusion of the learned judge was right and the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Lim Ganesh & Liu; Khattar Wong & Partners.*

Reported by *Ng Sheau Jiuan*

Standard Chartered Bank v Central Provident Fund Board

COURT OF APPEAL (SINGAPORE) – CIVIL APPEAL NO 80 OF 1986
WEE CHONG JIN CJ, THEAN AND CHUA JJ
18 JANUARY 1989

Civil Procedure – Orders of Magistrates' Courts for payment of arrears of CPF contributions under s 37 of Central Provident Fund Act (Cap 36, 1985 Ed) – Garnishee proceedings instituted to enforce orders – Whether orders constituted 'judgments or orders for payment' within meaning of O 49 r 1(1) of the Rules of the Supreme Court 1970 – Orders are criminal in nature and not equivalent to civil judgments or orders – O 49 not applicable to criminal proceedings – Central Provident Fund Act (Cap 36, 1985 Ed), ss 37(1) & 40 – Rules of the Supreme Court 1970, O 49 r 1(1)

Civil Procedure – Order of Magistrates' Court given in the exercise of its civil jurisdiction – Enforcement in High Court – Order may only be enforced upon application of person who has obtained the order and upon Magistrates' Court forwarding order to High Court with request for execution – Non-compliance with statutory requirements as stated in ss 46 and 54 of Subordinate Courts Act (Cap 231, 1985 Ed) goes to root of enforcement proceedings – Fundamental defect in procedure rendering proceedings a nullity – Non-compliance not a mere irregularity capable of cure under O 2 of the Rules of the Supreme Court 1970

K, a company required under the Central Provident Fund Act (Cap 36, 1985 Ed) ('the Act') to pay to the Central Provident Fund Board ('the Board') contributions for its employees, was in arrears of such contributions. The Board brought summonses in the Magistrates' Courts against K. K pleaded guilty to the charges, was convicted and fined. The Magistrates' Courts also ordered K to pay the arrears of the contributions under s 37(1) of the Act. However, the sums were not paid and the Board obtained warrants to levy any property belonging to K to satisfy the sums due. K was, at the material time, doing some work for T under certain contracts in respect of which certain payments were due to K. K gave an irrevocable letter of authority to T to pay K's bank, SCB (the appellant bank), these sums due.

Subsequently, the Board instituted garnishee proceedings in the High Court to enforce the orders of the Magistrates' Courts by garnishing the payments due to K in the hands of T. The court made a garnishee order nisi to that effect.

When a winding-up petition was presented against K by a creditor of K, the appellant bank (an interested third party by reason of the alleged assignment effected by the irrevocable letter of authority) took out an application under O 49 r 6 of the Rules of the Supreme Court 1970 ('the Rules') for an order, inter alia, that the garnishee order be discharged and that T be directed to pay it (the appellant bank) the sums found due and payable. The application was heard by the assistant registrar who ruled that the orders of the Magistrates' Courts for payment of arrears did not constitute 'judgments or orders for payment' within the meaning of O 49 r 1(1) of the Rules. The Board appealed to the High Court who allowed the appeal and ordered that the garnishee order be restored pending the making of a winding-up order against the company. The appellant bank appealed to the Court of Appeal. The essential question for decision is whether the four orders of the Magistrates' Courts for payment of arrears of contributions under s 37 of the Act are 'judgment(s) or order(s) for payment of money' within the meaning of O 49 r 1(1) of the Rules of the Supreme Court 1970 ('the Rules') which lays down the procedure for garnishee proceedings in the Supreme Court.

Held, allowing the appeal:

(1) The presentation for winding up should not preclude the learned judge from adjudicating on the issue relied upon by the appellant bank, namely, whether the Board was entitled to institute garnishee proceedings in respect of the four orders of the Magistrates' Courts. It is true that a judgment creditor who has not completed the enforcement of his judgment debt before a petition for winding up of the company is presented may be forced to prove in the liquidation as an unsecured creditor for his money but this does not mean that the court may not determine whether the mode of enforcement employed by the judgment creditor is one which is, in the first instance, available to him.

(2) The essential character of a judicial order is to be determined by reference to the nature of, and the procedure adopted for, the proceedings, that is to say, whether the proceedings are in the nature of civil or criminal proceedings.

(3) In the present case, the relevant orders were made by the Magistrates' Courts in the exercise of their criminal jurisdiction upon convictions for criminal offences under s 34 of the Act. The orders were, in form, criminal and are in the category of fines and penalties imposed for criminal offences under s 34 of the Act. Indeed, for the purposes of recovery, s 37 treats the orders as if they were fines. That the section gives a summary process for recovery of the amount due to the Board cannot convert the character of the order – which is stamped with a criminal character – into a civil debt or order.

(4) By s 40 of the Act, 'any sum due to the Fund may be sued for and recovered by the Board under the Government Proceedings Act as if it were a debt due to the government'. The section contemplates ordinary civil action or proceeding by the Board to recover any sum due and to enforce any judgment or order obtained therein; and points to a clear distinction drawn in the Act between civil and criminal procedure. To treat an order under s 37 as equivalent to a civil judgment or order for the purposes of O 49 would, in our view, render the express provision of s 40 redundant. Reading s 40 with s 37, it is only upon an entry of a judgment or order in pursuance of a civil proceeding that the Board may be able to avail itself of the process of enforcement of a money judgment or order.

(5) Even on the assumption that the relevant orders were orders of the Magistrates' Courts in the exercise of their civil jurisdiction, no execution proceedings could have been instituted in the High Court as under s 46 read with s 54 of the Subordinate Courts Act (Cap 321, 1985 Ed), an order of the Magistrates' Court in the exercise of its civil jurisdiction may only be enforced in the High Court upon an application of the person who has obtained the order and upon the Magistrates'